

**Public Prosecutor v Shahar bin Yusof & Ors
and other appeals**

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 42A-19
OF 2006, 42A-20 OF 2006, 42A-21 OF 2006 AND 42A-22 OF 2006
YEOH WEE SIAM JC
20 MAY 2009

C *Criminal Law — Anti Corruption Act 1997 — Ingredients to establish prima facie case — Bribery and corruption — Sections 10(a)(aa) and 11(a) — Police officer allegedly soliciting and accepting bribe as inducement to forbear from taking court action for offence of khalwat — Appeal against conviction and sentence — Whether relevant ingredients of charge established*

There were five criminal appeal cases against the decision of the sessions court judge herein. In Case No 61–6 of 2002, the three accused persons were charged under s 10(a)(aa) of the Anti-Corruption Act 1997 (‘the Act’) for soliciting gratification from SP1 and SP2. Meanwhile in the Case No 61–7 of 2002, the second and third accused were charged for receiving the gratification, an offence under s 11(a) of the Act. The above two cases were jointly tried. The brief facts of the case was that on 15 June 2001 at 12.30am, SP1 and SP2 were sitting in a car by the road side. The three accused persons approached them. The first accused told SP1 and SP2 that they could be charged for the offence of *khawat* in the court. The first accused then told SP2 that she could be released if RM5,000 was paid. After discussion, the first accused agreed to reduce the payment to RM3,000 and the money was to be paid on the same morning. To ensure that the money was paid, SP1 and SP2 surrendered the following items to the first accused, namely their underwear (to be kept as evidence), their identity cards and the mobile phone of SP1. SP1 then lodged a report with the Biro Pencegah Rasuah (BPR). The BPR arranged for a trap. As directed by the BPR, after handing over the trap money to the second and third accused at the waiting booth at the police station in Kampung Baru Subang, SP1 was to hang his mobile phone over his neck to give the signal to the BPR officers ie SP7, SP8 and SP9 who were observing from across the road to move in. Upon receiving the signal, SP8 together with SP7 and SP9, detained the second and third accused. The bag that contained the trap money was recovered from below the table where the second accused was seated. Upon being satisfied that the prosecution had established a prima facie case against the accused persons on their respective charges, the trial judge called for the defence for both cases. At the end of the defence case, the trial judge decided that the defence had not raised any

reasonable doubt against the prosecution's case. The three accused persons were accordingly found guilty, convicted and sentenced. In Case No 61–6 of 2002, the accused persons were sentenced to six months imprisonment and a fine of RM25,000 in default, six months imprisonment. While in Case No 61–7 of 2002, the accused persons were sentenced to six months imprisonment and a fine of RM15,000 in default four months imprisonment. The public prosecutor appealed against the sentence while the accused persons appealed against their conviction and sentence. The issue before this court was whether the trial judge had erred in facts and law when she decided that the prosecution had established a *prima facie* case against all the three accused persons on their respective charges and, after calling for the defence, held that the defence did not raise any reasonable doubt on the prosecution's case.

Held, allowing the prosecution appeals and dismissing the accused persons appeals:

- (1) The defence in respect of the charge under s 10(a)(aa) of the Act was a sham defence. The chain of events, beginning from the time SP1 and SP2 were approached by the three accused persons, had been fully supported by the evidence of SP1 and SP2, who also corroborated each other's evidence in material particulars. There was no reason for SP1 and SP2 to frame up the three accused persons, judging from the fact that SP1 had to go to the BPR for assistance. By the fact that the underwear, identity cards and SP1's mobile telephone had to be given to the first accused, it was consistent with SP1 and SP2's testimony that they were asked to pay the gratification money of RM5,000 which was later reduced to RM3,000 as an inducement for the three accused persons to forbear from taking court action against SP1 and SP2 for the offence of *khalwat* (close proximity) (see para 74).
- (2) By the fact that it was the second accused himself who showed SP7, SP8 and SP9 where the bag was, proved that he had knowledge of the matter and what SP1 testified was true. Whilst the second accused played the active role in this whole incident, the third accused was no less blameworthy for the fact that he acted with a common intention with the second accused and was with the second accused all the time when SP1 gave the money to them in the booth (see para 83).
- (3) What the three accused persons committed was a serious crime, they being police officers preying on innocent couples such as SP1 and SP2, whilst doing their routine crime prevention rounds. Instead of protecting members of the public, they abused their positions and power, and took the opportunity which arose in the course of their employment and duties, to put fear into SP1 and SP2 regarding a

- A possible prosecution for the offence of *khalwat* in order to solicit RM3,000 for a corrupt purpose ie to enrich themselves unlawfully. Therefore, a deterrent sentence should be imposed so that other members of the police force would abhor committing such similar offences of corruption (see paras 105–106).

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[Bahasa Malaysia summary]

- C Terdapat lima kes rayuan jenayah terhadap keputusan hakim mahkamah sesyen. Dalam Kes No 61–6 Tahun 2002, ketiga-tiga orang tertuduh telah dituduh di bawah s 10(a)(aa) Akta Pencegahan Rasuah 1997 ('Akta tersebut') kerana meminta suatu suapan daripada SP1 dan SP2. Sementara itu dalam Kes No 61–7 Tahun 2002, tertuduh kedua dan ketiga telah dituduh bagi memperoleh suapan tersebut, suatu kesalahan di bawah s 11(a) Akta tersebut. Kedua-dua kes tersebut dibicarakan bersama. Fakta-fakta ringkas
- D kes adalah bahawa pada 15 Jun 2001 pada pukul 12.30 pagi, SP1 dan SP2 berada di dalam sebuah kereta di tepi jalan. Ketiga-tiga tertuduh mendekati mereka. Tertuduh pertama memberitahu SP1 dan SP2 bahawa mereka boleh dituduh bagi kesalahan khalwat di mahkamah. Tertuduh pertama
- E kemudiannya memberitahu SP2 bahawa dia boleh dibebaskan jika RM5,000 dibayar. Selepas perbincangan, tertuduh pertama bersetuju untuk mengurangkan pembayaran kepada RM3,000 dan wang tersebut sepatutnya dibayar pada pagi yang sama. Untuk memastikan bahawa wang tersebut akan dibayar, SP1 dan SP2 menyerahkan barang-barang berikut kepada tertuduh
- F pertama iaitu, pakaian dalam mereka (untuk disimpan sebagai bukti), kad-kad pengenalan mereka dan telefon bimbit SP1. SP1 kemudian membuat satu laporan kepada Biro Pencegah Rasuah ('BPR'). BPR mengatur suatu perangkap. Seperti yang diarahkan oleh BPR, selepas menyerahkan wang perangkap kepada tertuduh kedua dan ketiga di pondok penantian di
- G balai polis di Kampung Baru Subang, SP1 akan menyangkut telefon bimbitnya ke lehernya untuk memberi isyarat kepada pegawai-pegawai BPR iaitu, SP7, SP8 dan SP9, yang sedang memerhati dari seberang jalan, untuk bertindak. Apabila menerima isyarat, SP8, bersama dengan SP7 dan SP9, telah menahan tertuduh kedua dan ketiga. Beg yang mengandungi wang
- H perangkap telah ditemui di bawah meja di mana tertuduh kedua telah duduk. Setelah berpuas hati bahawa pihak pendakwaan telah membuktikan satu kes prima facie terhadap tertuduh-tertuduh bagi pertuduhan masing-masing, hakim perbicaraan memanggil untuk pembelaan bagi kedua-dua kes tersebut. Di akhir kes pembelaan, hakim perbicaraan memutuskan bahawa pihak
- I pembelaan tidak menimbulkan apa-apa keraguan yang munasabah terhadap kes pihak pendakwaan. Ketiga-tiga tertuduh didapati bersalah, disabitkan dan dijatuhkan hukuman. Bagi Kes No 61–6 Tahun 2002, tertuduh-tertuduh telah dijatuhkan hukuman enam bulan penjara dan denda sebanyak RM25,000 jika gagal, enam bulan penjara. Manakala bagi Kes No

61–7 Tahun 2002, tertuduh-tertuduh telah dijatuhkan hukuman enam bulan penjara dan denda sebanyak RM15,000, jika gagal empat bulan penjara. Pihak pendakwaan merayu terhadap hukuman manakala tertuduh-tertuduh merayu terhadap sabitan dan hukuman. Isu di hadapan mahkamah ini adalah sama ada hakim perbicaraan telah khilaf dalam fakta-fakta dan undang-undang apabila beliau memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap ketiga-tiga orang tertuduh bagi pertuduhan-pertuduhan mereka masing-masing dan, selepas memanggil untuk pembelaan, memutuskan bahawa pembelaan tidak menimbulkan apa-apa keraguan yang munasabah terhadap kes pihak pendakwaan.

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Diputuskan, membenarkan rayuan-rayuan pihak pendakwaan dan menolak rayuan-rayuan tertuduh-tertuduh:

- (1) Pembelaan terhadap pertuduhan di bawah s 10(a)(aa) Akta tersebut ialah satu pembelaan yang palsu. Rentetan peristiwa, bermula daripada masa SP1 dan SP2 telah didekati oleh ketiga-tiga tertuduh, telah disokong sepenuhnya oleh keterangan SP1 dan SP2, yang juga menyokong keterangan satu sama lain dalam butir-butir material. Tidak ada sebab untuk SP1 dan SP2 membuat tuduhan palsu terhadap ketiga-tiga tertuduh, menilai daripada fakta bahawa SP1 terpaksa pergi ke BPR untuk bantuan. Oleh kerana fakta bahawa pakaian dalam, kad-kad pengenalan dan telefon bimbit SP1 perlu diberikan kepada tertuduh pertama, ia adalah konsisten dengan keterangan SP1 dan SP2 bahawa mereka telah diminta untuk membayar wang suapan sebanyak RM5,000 yang kemudiannya dikurangkan kepada RM3,000, sebagai dorongan untuk menghalang ketiga-tiga tertuduh daripada mengambil tindakan mahkamah terhadap SP1 dan SP2 untuk kesalahan khalwat (lihat perenggan 74).
- (2) Menerusi fakta bahawa tertuduh kedua sendiri yang menunjukkan kepada SP7, SP8 dan SP9 di mana beg tersebut berada, membuktikan bahawa dia mempunyai pengetahuan mengenai perkara itu dan apa yang SP1 berikan sebagai keterangan adalah benar. Meskipun tertuduh kedua memainkan peranan yang aktif dalam keseluruhan kejadian ini, tertuduh ketiga juga patut disalahkan kerana dia bertindak dengan satu niat bersama dengan tertuduh kedua dan berada bersama tertuduh kedua sepanjang masa apabila SP1 memberi wang kepada mereka dalam pondok (lihat perenggan 83).
- (3) Apa yang ketiga-tiga tertuduh lakukan adalah satu jenayah serius, mereka sebagai pegawai polis mengancam pasangan yang tidak bersalah seperti SP1 dan SP2, semasa melakukan kerja pencegahan jenayah rutin mereka. Tugas mereka melindungi orang ramai, sebaliknya mereka menyalahgunakan kedudukan dan kuasa mereka, dan mengambil

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- A peluang yang timbul semasa menjalankan pekerjaan dan tugas-tugas mereka, untuk menimbulkan rasa takut kepada SP1 dan SP2 mengenai kemungkinan pendakwaan bagi kesalahan khalwat untuk mendapatkan RM3,000 bagi satu tujuan rasuah iaitu, untuk memperkayakan diri mereka secara tidak sah. Oleh itu, satu hukuman yang berat patut dikenakan supaya ahli-ahli pasukan polis yang lain akan mengelak daripada melakukan kesalahan-kesalahan rasuah yang sebegitu rupa (lihat perenggan 105–106).]
- B

Notes

- C For a case on ingredients to establish a prima facie case, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 18.

Cases referred to

- D *Megat Halim Megat Omar v PP* [2009] 1 CLJ 154, CA (refd)
PP v Chettuvolu all Nani [2007] 6 MLJ 621; [2007] 9 CLJ 533, HC (refd)
PP v Dato' Waad bin Mansor [2005] 2 MLJ 101, FC (folld)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 96, HC (refd)
- E *Thavanathan all Balasubramaniam v PP* [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

- F Anti-Corruption Act 1997 ss 4(a)(i), 10(a)(aa), 11(a), 12, 42, 42(i), 47, 47(1)
 Criminal Procedure Code ss 152, 158, 159
 Evidence Act 1950 s 114(g)
 Penal Code s 34
- G *Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*
Zainal Ithnin (Zainal Ithnin & Partners) for the first, second and third accused.

Yeoh Wee Siam JC:

- H [1] These five criminal appeal cases are in respect of the decision of the learned sessions court judge, Petaling Jaya ('the trial judge') regarding Case 61–6 of 2002 and Case 61–7 of 2002.
- I [2] Case 61–6 of 2002 involves three accused persons ie Shahar bin Yusof ('the first accused'), Ahmad Raziman bin Hussain ('the second accused') and Iswandi bin Saili ('the third accused'). In this case, the first accused, second accused and third accused have been charged as follows:

Bahawa kamu pada 15 Jun 2001 lebih kurang jam 12.30 pagi, di tepi jalan kawasan perumahan Subang Bistari, di dalam Daerah Petaling dalam Negeri Selangor, sebagai ejen kepada Kerajaan Malaysia, iaitu Koperat 105255, Konstabel 132334 dan Konstabel 140301 yang bertugas di Balai Polis Kampung Baru Subang bagi mencapai niat bersama kamu bertiga telah secara rasuah meminta suatu suapan untuk diri kamu iaitu wang tunai RM5000/= daripada Shukarno bin Malek Shaharaman @ Zakaria dan Norzaheeda binti Wan Zulkifli sebagai upah untuk tidak mengambil tindakan terhadap Shukarno bin Malek Shaharaman @ Zakaria dan Norzaheeda binti Wan Zulkifli yang dikatakan melakukan kesalahan berkhawat dan dengan itu kamu bertiga telah melakukan satu kesalahan di bawah s 10(a)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta No 575) yang boleh dihukum di bawah s 6 Akta yang sama dan dibaca bersama dengan s 34 Kanun Keseksaan.

[3] For Case 61–7 of 2002, only two accused persons are involved. The second and third accused were charged as follows:

Bahawa kamu pada 15 Jun 2001 lebih kurang jam 6 petang di tempat rehat dalam kawasan Balai Polis Kampung Baru Subang, di dalam Daerah Petaling, dalam Negeri Selangor, sebagai ejen kepada Kerajaan Malaysia, iaitu Konstabel 132334 dan Konstabel 140301 yang bertugas di Balai Polis Kampung Baru Subang bagi mencapai niat bersama kamu berdua telah secara rasuah memperoleh suatu suapan untuk diri kamu iaitu wang tunai RM5000/= daripada Shukarno bin Maiek Shaharaman @ Zakaria sebagai upah untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu, iaitu tidak mengambil tindakan terhadap Shukarno bin Malek Shaharaman @ Zakaria dan Norzaheeda binti Wan Zulkifli yang dikatakan melakukan kesalahan berkhawat dan dengan itu kamu telah melakukan satu kesalahan di bawah s 11(a) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta No 575) yang boleh dihukum di bawah s 16 Akta yang sama dan dibaca bersama dengan s 34 Kanun Keseksaan.

[4] Both cases ie 61–6 of 2002 and 61–7 of 2002 ('both cases') were jointly tried.

[5] The trial judge called for the defence for both cases after being satisfied that the prosecution had established a prima facie case against the accused persons on their respective charges.

[6] At the end of the defence case, the trial judge decided that the defence has not raised any reasonable doubt against the prosecution case. The three accused persons were accordingly found guilty, convicted and sentenced as follows:

Case 61–6 of 2002 (regarding the offence under s 10(a)(aa) of the Anti-Corruption Act 1997 ('the Act')):

A six months imprisonment and a fine of RM25,000 in default six months imprisonment.

Case 61–7 of 2002 (regarding the offence under s 11(a) of the Act):

B six months imprisonment and a fine of RM15,000 in default four months imprisonment.

The five criminal appeal cases before me are as follows:

Criminal Appeal 42A–19 of 2006

C The public prosecutor is appealing against the sentence.

Criminal Appeal 42A–20 of 2006

The second accused is appealing against his conviction and sentence.

D *Criminal Appeal 42A–21 of 2006*

The first accused is appealing against his conviction and sentence.

Criminal Appeal 42A–22 of 2006

E The public prosecutor is appealing against the sentence.

Criminal Appeal 42A–23 of 2006

The second accused is appealing against his conviction and sentence.

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[7] In view of the five appeals, for ease of reference, the public prosecutor would be referred to as the public prosecutor, whether in his capacity as the appellant or respondent. The three accused persons would be referred to as the first accused, second accused and third accused, whether in their respective capacity as the appellant or respondent.

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[8] The written submissions and authorities of learned counsel for the three accused persons are found in A1 and A2. The written submissions and authorities of the prosecution are found in B1, B2 and B3.

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[9] The five appeals were heard by this honourable court on 15 May 2009, after which I proceeded straightaway to give my decision on the appeals.

I [10] All the five appeals are considered together here.

[11] Briefly, the findings of fact by the trial judge based on the evidence of the prosecution witnesses are as follows (see pp 826–832 of the appeal record).

[12] On 15 June 2001 at 12.30am, SP1 and SP2 were sitting in a car by the road side. The three accused persons approached them. The first accused told SP1 and SP2 that they could be charged for the offence of *khalwat* in court. The first accused then told SP2 that she could be released if RM5,000 is paid.

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[13] The second accused slapped SP1 on his face. This was seen by SP2. The first accused next asked SP1 to look for the money. After discussion, the first accused agreed to reduce the payment to RM3,000.

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[14] During the discussion, SP2 felt someone touching her buttocks and behind. SP1 saw the third accused tapping SP2's buttocks twice. Then the first accused asked SP1 and SP2 to take off their underwear ('the underwear') to be kept as evidence together with their identity cards and SP1's mobile phone No 019-2398600. These were surrendered to the first accused. The first accused asked SP1 and SP2 to contact him on the same morning to pay the RM3,000.

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[15] SP1 lodged a report with the Biro Pencegah Rasuah ('BPR'). SP3 directed SP4 to record the telephone conversation of SP1's call using telephone no 019-3568600 to a male who was using telephone No 019-2398600. In that telephone conversation, SP1 informed the person called that he did not have the money and needed more time. The person called told SP1 to make sure there was enough money by 12.45pm, the same day. The person called did not agree to payment being made outside the police station because it was dangerous and he told SP1 to make payment at the waiting booth ('pondok menunggu') at the police station in Kampung Baru Subang.

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[16] Later, SP1 received a call from a telephone No 012 (SP1 could not remember the full number) asking whether SP1 had enough money already. SP1 replied that the money was still not enough. The caller told SP1 not to trap him. SP1 promised to call the caller once he has enough money.

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[17] The BPR decided to arrange for a trap where certain trap money for RM3,000 were prepared ie 60 pieces of RM50 notes, not marked, but according to serial number.

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[18] After his briefing by the BPR, when SP1 was driving off at about 5.30pm on the same day, he received a call from a telephone No 012 (again SP1 could not remember the full number), asking SP1 where he was and SP1 told the caller that he was arriving at the police station in Kampung Baru Subang very soon. Later, SP1 received another call from the same number asking SP1 to come quickly.

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- A [19] SP1 arrived at the location intended for the trap at 6.30pm of the same day ie to the police station in Kampung Baru Subang.
- B [20] SP1 met the second and third accused at the waiting booth in the compound of the said police station. SP1 saw a plastic bag containing the identity cards, underwear and mobile phone placed at the feet of the third accused.
- C [21] SP1 then handed over the trap money as directed by the second accused and placed them in a small, blue Adidas bag ('the bag').
- D [22] As directed by the BPR, after handing over the trap money, SP1 handed his mobile phone over his neck to give the signal to the BPR officers ie SP7, SP8 and SP9, who were observing from across the road to move in.
- E [23] SP8 detained the second and third accused as they were walking towards the inquiry office. SP7 and SP9 took the two accused persons to the previous waiting booth. SP9 directed both accused persons to take out everything from their clothes and trousers. The trap money was not found at this stage.
- F [24] SP9 telephoned SP5 to ask SP1 where both accused persons had kept the money. SP5 told SP9 that the trap money of RM3,000 was kept in the bag. SP9 then asked the second accused where he kept the bag. The second accused took the bag from below the table, near his left leg. He placed the bag on the table. SP9 found the trap money inside the bag. He then arrested the two accused persons.
- G [25] The issue is whether the trial judge had erred in facts and law when she decided that the prosecution had established a *prima facie* case against all the three accused persons on their respective charges and, after calling for the defence, held that the defence did not raise any reasonable doubt on the prosecution's case to rebut it.
- H *Whether a prima facie case has been established for the charge under s 10(a)(aa) of the Act*
- I [26] The ingredients required to be proved for the offence under s 10(a)(aa) of the Act are as follows:
- (1) any person, who by himself or with any other person;
 - (2) corruptly solicits;
 - (3) any gratification; and

(4) as inducement to any person doing or forbearing to do anything in respect of any matter (see also *Public Prosecutor v Chettuvolu a/l Nani* [2007] 6 MLJ 621; [2007] 9 CLJ 533).

A

[27] The trial judge was not wrong when she itemised the above ingredients of the offence in her own manner as follows, taking into account the fact that the three accused persons are agents of the Government of Malaysia as stated in the charge, and acting with a common intention (see p 833 of the appeal record).

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(i) The three accused persons are agents of the Government of Malaysia;

C

(ii) The three accused persons with a common intention, requested ('meminta') for themselves a gratification of RM5,000 on 15 June 2001;

(iii) The circumstances under which such gratification was requested give rise to the presumption that the gratification was corruptly requested;

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(iv) The three accused persons had requested for such gratification as an inducement for not taking action against the couple, SP1 and SP2.

[28] Going by the above itemised ingredients, the trial judge in pp 833–840 of the appeal record established how each ingredient has been proved by the prosecution.

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INGREDIENT (i)

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[29] The three accused persons are agents of the Government of Malaysia based on their service records as adduced by SP14, the Discipline Inspector, IPD Management Division, Petaling Jaya. Exhibits P17 and P19 prove that the three accused persons are members of the Royal Malaysian Police Force (PDRM) at the time of the incident on 15 June 2001 and they were serving at the police station in Kampung Baru Subang.

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[30] The trial judge correctly relied on s 47(1) of the Act for admitting the evidence of SP14 on behalf of his principal regarding the positions of the three accused persons as prima facie proof by the principal.

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INGREDIENT (ii)

[31] SP1 and SP2's evidence established that they were approached by three police officers ie the three accused persons. The first accused did tell SP2, that SP1 and SP2 can be charged in court for the offence of *khalwat* and can be brought to court that same night. SP2 asked that she and SP1 be released. The first accused instead asked SP2 how many siblings did she have. When

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- A SP2 replied that she had five siblings, the first accused stated 'If you want to be released, you have to pay RM5,000'.

- B [32] The third accused told SP1 that if he wished to settle the matter, he should see the first accused (see pp 826 and 835 of the appeal record). After discussion, the first accused agreed to reduce the payment to RM3,000. The payment had to be made in the morning of the same day. The first accused also directed SP1 and SP2 to take off their underwear and hand them over to him, together with their identity cards and SP1's mobile telephone. The first accused told SP1 and SP2 that the mobile telephone is for the purpose of making it easy for SP1 and SP2 to contact them.

- D [33] The trial judge found that each of the three accused persons had their respective roles in the incident. The second accused opened the car door on the driver's side and slapped SP1. The third accused told SP1 to see the first accused if he wished to settle the case. The first accused played an active role by requesting for RM5,000 from SP2 which was later agreed to be reduced to RM3,000. The first accused also ordered SP1 and SP2 to take off their underwear and hand them over together with their identity cards and SP1's mobile telephone.

- E [34] The first accused is a police officer holding the rank of corporal (see exh P17). He acted as a head to the second and third accused, who were both holding the rank of police constable (see exhs P18 and P19).

- F [35] Based on the above, the trial judge is correct to conclude that the three accused persons, as Government agents, had acted with a common intention by requesting for themselves gratification amounting to RM5,000 from SP1 and SP2. Such amount was later reduced to RM3,000 by the first accused.

- G INGREDIENT (iii)

- H [36] The trial judge invoked the presumption in s 42 of the Act to support her finding that the circumstances under which the gratification was sought give rise to the presumption that the gratification was corruptly requested.

- I [37] I am of the opinion that the presumption in s 42 of the Act is not an ingredient required for the offence under s 10(a)(aa) of the same Act. In this case, the trial judge, upon evaluating the evidence, and having come to a finding of fact that gratification has been requested, or solicited, by the three accused persons from SP1 and SP2, decided to invoke and rely on the presumption in s 42 of the Act ie to presume that such gratification has been corruptly accepted or agreed to be accepted. The reasons of the trial judge for relying on such presumption are stated in p 837 of the appeal record, and I

think she is correct when she made a finding of fact that SP1 and SP2 were not brought to the Jabatan Agama Islam, no police report was made and the underwear, identity cards and mobile telephone of SP1 were seized from SP1 and SP2. However, I need to state here that even without relying on the presumption in s 42 of the Act, the evidence shows very clearly that the gratification requested for, or solicited by the three accused persons from SP1 and SP2 is for a corrupt purpose ie as an inducement for not taking action against them in court for the offence of *khalwat*. This is fortified by the fact that the first accused, apart from asking SP1 and SP2 to hand over their identity cards and SP1's mobile telephone to him in particular, ordered SP1 and SP2 to take off their underwear and to give them to him to be kept as evidence.

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INGREDIENT (iv)

[38] In pp 838 and 839 of the appeal record, the trial judge gave her reasons to support her finding that the three accused persons had requested for the gratification as an inducement not to take action against the couple, SP1 and SP2.

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[39] First of all, SP1 and SP2 were detained because they were both together in the car. The first accused informed SP1 and SP2 that they could be charged for the offence of *khalwat* and be brought before the court that same night as well. However, when SP1 and SP2 appealed to be released, the request for gratification then began. At first RM5,000 was requested for. After their discussion, it was agreed to be reduced to RM3,000.

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[40] I agree with the trial judge when she stated that by detaining SP1 and SP2 and later threatening them with the charge for the offence of *khalwat*, it is clear that the three accused persons had the intention to request for the gratification as an inducement for not taking action against SP1 and SP2 for the offence of *khalwat*. Even though what was promised or undertaken by the three accused persons is not true, the trial judge is correct when she applied s 12 of the Act ie the acceptor, or agent of the principal, inter alia, is guilty notwithstanding that he did not have the power, right or opportunity so to do, show or forbear, and the favour was not in relation to his principal's affairs or business. It is common knowledge and I also take judicial notice of the fact that police officers do not have the powers to prosecute offenders for the offence of *khalwat* in a Syariah Court. Thus, what the three accused persons promised or undertake with SP1 and SP2 is wrong.

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[41] The trial judge also pointed out that the detention and search of SP1 and SP2 is not recorded in any document. Likewise, the seizure of the

A identity cards of SP1 and SP2 is also not recorded. In the Buku Perhatian Balai POL 40 (exh P16), what is only recorded is that the situation is good.

B [42] The trial judge rightly concluded that this showed that the three accused persons definitely did not wish to report officially the detention of SP1 and SP2 and the seizure of the underwear, identity cards and mobile telephone after their return from their patrol duty.

C [43] The identity of the three accused persons is not an issue. The trial judge pointed out that SP1 and SP2 could identify them. The place of incident was not very dark. Moreover, the small lights of the couple's red Proton Satria were switched on and there was a street light. The first accused was also using his torch light. SP1 could see the name tag of the first accused ie Shahar.

D [44] The Daftar Harian Pekerjaan tendered by SP10 proves that the three accused persons and two other police officers were on crime prevention patrol duty at the time and place of the incident.

E [45] Based on the fact that all the above ingredients of the charge under s 10(a)(aa) of the Act were proved by the prosecution, the trial judge rightly called for the defence on the charge.

F *Whether a prima facie case has been established for the charge under s 11(a) of the Act*

G [46] The ingredients required to be proved for the offence under s 11(a) of the Act are as follows:

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- (1) any agent corruptly accepts any gratification; and
 - (2) the gratification is an inducement for doing or forbearing to do any act in relation to the principal's business or affairs.

H [47] The trial judge is not wrong when she summarised the above ingredients within the context of the charge preferred against the second and the third accused as follows (see p 840 of the appeal record):

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- (i) a gratification ie RM3,000 has been paid or given to or received by the second and third accused who acted with a common intention;
 - (ii) at the time of receipt of the gratification, the second and third accused were members of a public body.

[48] In pp 840–843 of the appeal record, the trial judge gave her findings of fact based on the evidence adduced: A

[49] A trap was planned by the BPR based on SP1's complaint (exh P2). Exhibit P2 is regarding the request for money by the accused persons. The trap money was proposed and marked (exh P4 (1–60)) ie 60 RM50 notes totaling RM3,000. B

[50] SP1 drove to the police station in Kampung Baru Subang. He then went to the waiting booth in the compound of the police station and met the second and third accused. C

[51] SP1 saw that the plastic bag containing the underwear, identity cards of SP1 and SP2 and mobile telephone of SP1 ('the plastic bag') was placed between the third accused's legs. D

[52] The second accused told SP1 to sit in between the second and third accused. After that the second accused handed over the plastic bag to SP1. Then, the second accused directed SP1 to put the RM3,000 inside a blue Adidas bag ('the bag'). SP1 did ask the second and third accused to count the money but they refused. After that SP1 hanged his mobile telephone from his neck, left the booth and went to his car. The second accused called SP1 back and told SP1 not to tell anyone, otherwise SP1 is finished. After that, SP1 drove the car out from the place. E

[53] SP7, SP8 and SP9 who were outside the compound of the police station, were observing the whole situation. Upon seeing SP1 hanging his mobile telephone from the neck, SP8 together with SP7 and SP9, went and detained the second and third accused as they were walking towards the inquiry office of the police station in Kampung Baru Subang. F
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[54] SP7 and SP9 took the second and third accused to the waiting booth. They could not find the marked notes. After SP9 telephoned SP5 to ask about the money, SP7 asked where the bag was and the second accused showed or pointed out that the bag was below the table near the second accused's feet. SP9 then directed the second accused to take the bag out and take out the contents of the bag. A sum of RM3,000 was found. A check was made and it was found that the serial numbers of the money are the same as the ones in exh P3. The bag and money were then seized (exh P11). H

[55] The trial judge stated that the involvement of the second and third accused was very clear. The second accused's role was even clearer. He was the one who directed SP1 to put in the RM3,000 into the bag. He was also the one to give the plastic bag containing the underwear, identity cards and I

- A mobile telephone to SP1. The second accused also told SP1 not to tell anyone about the incident. Even though the third accused appeared to be passive, he certainly knew what was going on. Anyway, the plastic bag was initially placed in between his legs. The third accused saw SP1 putting in the money in the bag. He did not prevent or obstruct SP1 or the third accused at the time when the money was given or received.

- [56] Both the second and third accused were waiting together for SP1 at the waiting booth. They acted with a common intention for accepting the RM3,000 from SP1. Both the second and third accused were also then serving as police officers, and therefore were agents of the Government of Malaysia.

- [57] Based on the above, the trial judge is correct when she decided that the prosecution had established a prima facie case against the second and third accused for an offence under s 11(a) of the Act read together with s 34 of the Penal Code, and when she called for the defence.

- Whether the defence has cast any reasonable doubt on the prosecution's case to rebut it*

- E Charge under s 10(a)(aa) of the Act

- [58] The trial judge found that the defence did not cast any reasonable doubt on the prosecution's case to rebut it for the following reasons (see pp 844–846 of the appeal record):

- [59] The defence of the first accused is that on 15 June 2001 at 12.30am, the first accused and four other police officers were doing their patrol duty in the housing estate of Subang Bistari. The first accused saw a car parked at a dead end on a hill, so the first accused and three police officers approached the car.

- [60] The first accused saw the second and third accused going towards the direction of the driver ie SP1, when the first accused went towards the passenger ie SP2. The first accused asked SP1 to get out of the car for a normal inspection. The second accused introduced himself as a police officer. The first accused asked SP2 what was she doing there and SP2 answered that she wanted to charge her SIM card and to send some things to her relative. After that the first accused and SP2 went to the bonnet (I believe he meant the boot since it is at the back of the car) at the back to look at the things that SP2 mentioned. Then the first accused and SP2 went to the front passenger seat of the car. According to the first accused, SP2 was very angry when questioned by him. After that, the first accused told the third accused

to take the identity cards of SP2 to record them in the inspection form. The first accused was not sure whether the identity card was returned to SP2 by the third accused.

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[61] Whilst the first accused was talking to SP2, his torchlight was switched on. After that the first accused advised SP1 and SP2 not to come to the place again as it was dark and dangerous. After that the first accused and the other police officers left the place.

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[62] The second accused in his defence stated that he only asked SP1 to get out of the car for a normal inspection. The second accused did ask SP1 their reason for being there. According to the second accused, SP2 looked dissatisfied and became angry. The second accused also did ask for the identity card of SP1 for a normal inspection. After that the second accused left the place.

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[63] The defence of the third accused is that he was at the front of the car, on the left. The third accused saw the first accused talking to SP2 and then the two of them going to the bonnet (here again, I believe he meant the boot since it is at the back) of the car. The third accused also saw the quarrel between the second accused and SP1. The third accused recorded the number of the car, the road tax number and the identity card numbers of SP1 and SP2 in the inspection form. After that the third accused gave back the identity cards to SP1 and SP2. The third accused did not hear any conversation between the first and second accused and SP1 and SP2. After that the third accused left the place.

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[64] All three accused persons denied requesting for the sum of RM5,000, which was later reduced to RM3,000, from SP1 and SP2. They denied telling SP1 and SP2 to take off their underwear and taking them together with the identity cards of SP1 and SP2 and the mobile telephone of SP1. They also denied telling SP1 and SP2 to telephone them in the morning to pay RM3,000.

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Charge under s 11(a) of the Act

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[65] The defence of the second and third accused is that on 15 June 2001 at about 5.30pm after the roll call, they did not go back because it was raining heavily. The second accused and a few other police officers took shelter at a booth ('pondok'). After about half an hour, the other police officers left the place. Suddenly, a red Proton Satria came into the compound of the police station in Kampung Baru Subang. The second accused saw SP1 getting out of the car and came to ask him where his identity card was. The second accused replied that SP1's identity card had been returned but he would

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- A check with the inquiry office. SP1 agreed. After that SP1 said that he wished to take his mobile telephone from his car. When the second and third accused were walking towards the inquiry office, suddenly a male, who identified himself as a BPR officer, detained the second and third accused. After that they were brought to the booth and given a complete body search but
- B nothing was found. The second accused stated that the BPR officer threatened to take off his pants and shirt at the booth if the money they were searching for was not found. After that a BPR officer, who is a photographer, came to the booth and put down a blue Adidas bag ('the bag') containing money. The second accused was shocked and did not know where the bag
- C and money came from. After that the second accused was forced to count the money. The second accused refused but he was slapped in the face with the money. After counting the money under inspection, out of fear, the second accused then signed the form given to him by the BPR officer.
- D [66] The defence of the second and third accused is that they did not know why SP1 came to see them to ask about the identity card. They denied receiving any money from SP1. They also did not know about the bag containing money. The second accused stated that the bag was placed on the table in the booth by a BPR officer named Bulkhini whereas the third accused
- E said that he was not sure where the bag came from.
- [67] In respect of the charge under s 10(a)(aa) of the Act, the trial judge decided that the defence of the three accused persons did not raise any reasonable doubt for the following reasons:
- F
- [68] If what the first and second accused stated is correct, that the inspection of SP1 and SP2 was a normal inspection, then why was it necessary for SP1 and SP2 to get out of the car? To me, this is not a very
- G accurate or material conclusion because even for a normal inspection, the police are entitled to direct SP1 and SP2 to get out of the car.
- [69] If it is true that a record was made of the identity card numbers of SP1 and SP2, the car registration number and the road tax number, then the form or paper should be produced, but this was not done. Exhibit P16 did not
- H show that anything had happened during the crime prevention patrol in the early morning of 15 June 2001.
- I [70] Regarding the request for gratification, initially for RM5,000 which was later reduced to RM3,000, there was no explanation from the three accused persons at all. The three accused persons merely gave a bare denial. If no gratification was requested and if the underwear, identity cards and SP1's mobile telephone were not seized, it is highly improbable for SP1 to go to the police station in Kampung Baru Subang to settle the matter. In fact,

according to the defence, the first thing that SP1 asked of the second accused when he came to the compound of the police station was for his identity card. It is therefore more probable that SP1 and SP2 were telling the truth when they stated that their identity cards were taken by the first accused together with their underwear and SP1's mobile telephone.

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[71] If it was a normal inspection, SP1 and SP2 would not have become angry. The trial judge is of the view that SP1 and SP2 got angry because they would be charged for *khalwat* if they did not pay the gratification or money to the three accused persons. Moreover, SP1 and SP2 were both told to take off their underwear by the first accused and to give them to him together with their identity cards and SP1's mobile telephone. The trial judge was of the opinion that anyone in these circumstances would be angry.

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[72] The trial judge decided that since the defence of the three accused persons is merely a denial, the three accused persons were unable to rebut the presumption under s 42 of the Act. (I believe there is a typographical error at p 849 of the appeal record or grounds of judgment of the trial judge. She was in fact referring to s 42 and not s 47 which appears in her judgment. Section 47 is not about presumption but regarding a certificate of position on office held, whereas s 42 is regarding the presumption referred to earlier).

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[73] The trial judge also held that the defence of the three accused persons did not raise any reasonable doubt on the prosecution's case. She is also of the opinion that the evidence of the three accused persons is not credible and is only a bare denial.

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[74] I agree completely with the findings and evaluation of the trial judge regarding the defence in respect of the charge under s 10(a)(aa) of the Act. To me, the whole defence of the three accused persons is a sham defence. The chain of events, beginning from the time SP1 and SP2 were approached by the three accused persons, has been fully supported by the evidence of SP1 and SP2, who also corroborated each other's evidence in material particulars. There is no reason for SP1 and SP2 to frame up the three accused persons, judging from the fact that SP1 had to go to the BPR for assistance. By the fact that the underwear, identity cards and SP1's mobile telephone had to be given to the first accused, it is consistent with the SP1 and SP2's testimony that they were asked to pay the gratification money of RM5,000 which was later reduced to RM3,000, as an inducement for the three accused persons to forbear from taking court action against SP1 and SP2 for the offence of *khalwat*. It is irrelevant that the three accused persons did not have such power (see s 12 of the Act which was invoked by the trial judge).

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- A [75] On a balance of probabilities, it is highly improbable that the three
accused persons were only doing a normal inspection of SP1 and SP2 and did
not request for the gratification or give directions to SP1 and SP2 on how to
make payment to them on the same day. The trial judge did not err in fact
or in law when she found the three accused persons guilty and convicted
B them on the charge under s 10(a)(aa) of the Act.

- C [76] In respect of the charge under s 11(a) of the Act, the trial judge
decided that the defence of the second and third accused did not raise any
reasonable doubt for the following reasons:

- D [77] She did not see any reason why the second and third accused were just
sitting in the booth after the roll call, after the rain, when all the other police
officers have left. She believed that the second and third accused concocted
their reasons for being at the booth and thought that it is more probable that
they were waiting for SP1 to come. She relied on SP1's evidence that he
received two telephone calls that afternoon asking SP1 to come to the place.

- E [78] According to the second accused, SP1 asked about his identity card
and the second accused stated that the identity card had been returned. The
trial judge believed that there was no necessity to check with the inquiry
office if it is true that the identity card had been returned. She also wondered
why the third accused did not inform SP1 that the third accused had already
F returned the identity cards of SP1 and SP2 since it was the third accused who
recorded the numbers of the identity cards when SP1 and SP2 were first
questioned at the car. Therefore, the trial judge thought that the story about
the identity card is fabricated since in truth the identity card was already in
the hands of the second and third accused.

- G [79] Regarding the bag containing money, the second and third accused
denied that they had the bag. Instead, they stated that the bag was placed on
the table by Bulkhini, the BPR photographer. This was not raised at the stage
of the prosecution's case. I agree with the trial judge that the defence
H regarding Bulkhini's role cannot be accepted since the prosecution witnesses
were not challenged in cross-examination on it. In my opinion, the defence
story, that it was Bulkhini who placed the bag containing the money on the
table, is only an afterthought. This is supported by the case of *Megat Halim
Megat Omar v Public Prosecutor* [2009] 1 CLJ 154 where the Court of Appeal
I held:

Although in our criminal jurisprudence, there is no burden on an accused person
to prove his innocence but merely for him to raise a reasonable doubt as to his
guilt, it is trite that his defence should be put to the prosecution at an early stage

during the prosecution case. *Failure to do so may move the trial court to dismiss a particular line of defense as an afterthought, or a recent invention as happened in this case.*

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Raja Allan Shah, CJ (Malaya) (as His Highness then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138 (FC) puts this principle in these now famous words:

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... there is a general rule that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of a witness's testimony.

In our adversarial system, that principle is applicable in both civil and criminal trials. (Emphasis added.)

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[80] The trial judge believed SP1's testimony that SP1 was directed by the second accused to put the money into the bag. Because of that, only the second accused would know where the bag was. SP7 and SP9 stated that the second accused took the bag which was at his feet when they asked him about it.

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[81] The trial judge believed that the bag was left near the second accused's feet when he was brought to the booth. Before that, SP9 did see the second accused holding the bag at the time when he was arrested. That was why during the initial body search on the second and third accused, the trap money could not be found. It was only after being questioned many times by the BPR officers that the second accused took the bag out from where it was placed near his feet.

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[82] The trial judge referred to the defence of the second and third accused which stated that SP7, SP8 and SP9 could not see from across the road what happened at the booth because of the long distance from where they were observing on the road. The trial judge is of the opinion, after visiting the site with the deputy public prosecutor, the defence counsels and the three accused persons, that from across the road, facing the police station in Kampung Baru Subang, the compound of the police station and booth could be seen clearly. This is where I have rely on the good judgment of the trial judge and accept her finding that SP7, SP8 and SP9 could see what was going on from across the road. However, even if they could not see clearly from where they were, what is material is that SP7, SP8 and SP9 could recover the bag containing the money after being shown the bag by the second accused himself.

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[83] From the above, it is without doubt that the trial judge did not err in fact or law in deciding that the defence of the second and third accused did not raise any reasonable doubt on the prosecution's case to rebut it. By the fact that it was the second accused himself who showed SP7, SP8 and SP9 where the bag was, it proves that he had knowledge of the matter and what

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A SP1 testified is true. Whilst the second accused played the active role in this whole incident, the third accused was no less blameworthy for the fact that he acted with a common intention with the second accused and was with the second accused all the time when SP1 gave the money to them in the booth.

B [84] The trial judge rightly found the second and third accused guilty and convicted them on the charge under s 11(a) of the Act.

OTHER ISSUES RAISED BY COUNSEL FOR THE FIRST AND SECOND ACCUSED ('LEARNED COUNSEL')

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[85] Learned counsel submitted that for the charge under s 11(a) of the Act, the trial judge did not invoke the presumption in s 42 of the Act, which she did for the charge under s 10(a)(aa) of the same Act. That being the case, the prosecution has failed to prove that the money was obtained for a corrupt purpose and there is therefore no burden of proof on the defence to rebut the presumption.

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E [86] Here, I agree with the prosecution's submission that the trial judge had to rely on the presumption for the charge under s 10(a)(aa) of the Act because during that time the gratification or money had not been given or passed yet, whereas for the charge under s 11(a) of the Act, the gratification had been given and accepted ie SP1 handed over the RM3,000 to the second accused by placing the money in the bag, as directed by the second accused, and it was done in the presence of the third accused. It is clear that the second and third accused had accepted gratification for a corrupt purpose since SP1 had given the money as requested earlier and it was for the purpose that no action would be taken by the three accused persons against SP1 and SP2 for the offence of *khalwat*.

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[87] Learned counsel also submitted that the trial judge failed to consider the evidence of SD4, who was present at the place of the incident, and such evidence would support the first accused's evidence and with that the presumption under s 42(1) of the Act could be rebutted. Here again, I agree with the prosecution's submission that SD4 stated that he did not hear what was said in the conversation between the first accused and SP2. SD4 also stated that he was not sure whether it was the third accused or the first accused who spoke to SP1 that night.

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I [88] On the issue whether the trial judge should also have considered the evidence of SD5, I agree with the prosecution's submissions that SD5 confirmed SP1's testimony that the first accused was the one who approached SP2 and spoke to her. SD5's evidence also confirmed SP1's evidence that the second accused did direct SP1 to get out of the car.

[89] It is therefore very clear that the evidence of SD4 and SD5 is not helpful to rebut the evidence of SP1 and SP2 regarding the request for the gratification of RM5,000. In fact, the whole evidence of SD4 and SD5 does not in any way assist in the defence of the three accused persons.

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[90] In their respective appeal records, the first and second accused questioned why the two other police officers who were at the place of the incident were not charged in court. Here, I am of the view that the public prosecutor has the discretion to decide on who to charge. There is no necessity to charge the other police officers, if, as submitted by the prosecution, the evidence of SP1 and SP2 is only against the three accused persons and not the other two police officers.

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[91] In their respective appeal records, the first and second accused averred that SP15 failed to complete his investigations as follows:

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- (1) failed to go to the place of incident;
- (2) failed to check with JAIS regarding the *khalwat* incident;
- (3) failed to produce the underwear of SP1 and SP2 and their identity cards, and the mobile telephone of SP1;
- (4) failed to produce the particulars of the handphone conversation from CELCOM; and
- (5) did not actually know who requested for the money.

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[92] Learned counsel raised the issue that the prosecution failed to call Bulkhini as a witness. From the beginning, Bulkhini was not in the picture but suddenly he came into the picture and he was the one who placed the trap money on the table when the second and third accused were detained at the booth. While I agree with the prosecution's reply that an adverse inference under s 114(g) of the Evidence Act 1950 should not be invoked for failure to call any prosecution witness, but could only be invoked for the withholding of evidence (see *Public Prosecution v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; [1976] 1 LNS 96), I am of the firm opinion that the defence story, that Bulkhini suddenly came in, placed the bag with the trap money on the table, is a mere fabrication concocted for this case and should not be believed at all. This is more so when the defence did not challenge the evidence of the prosecution witnesses in their cross-examination by bringing up Bulkhini's role in the matter.

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[93] Learned counsel also referred to pp 83 and 91 of the appeal record where SP2 was asked why the RM5,000 had to be paid. The first accused asked SP2 how many siblings SP2 had after which SP2 was asked to pay RM5,000. Learned counsel submitted that the prosecution witnesses have

- A not explained why SP2 was asked regarding her five siblings and the linkage with the RM5,000. To my mind, only the first accused himself can explain why he had such a peculiar way of quantifying the amount of gratification ie asking for RM5,000 just because SP2 replied him that she had five siblings. In any case, the whole evidence of SP1 and SP2 show clearly that the
- B RM5,000 was solicited by the three accused persons, acting with a common intention, based on the threat of a possible court action against SP1 and SP2 for the offence of *khalwat* if the RM5,000 or RM3,000 as it was later reduced to, was not paid to the three accused persons. In any case, as submitted by the prosecution, SP2 in her examination-in-chief (see p 83 of the appeal record)
- C did explain why the RM5,000 had to be paid.

- [94] To me, if all of the above issues raised by the three accused persons in (i)–(v) were investigated by or made known by SP15, it would complete the evidence of the prosecution’s case and give a clearer picture of the whole incident. However, these issues are not material to the prosecution’s burden of proving the ingredients of each charge to establish a *prima facie* case. Even without such investigation by SP15 on those matters, what the prosecution has adduced in evidence through all its witnesses, in particular SP1, SP2,
- D SP7, SP8 and SP9 is sufficient to prove the two charges under s 10(a)(aa) and s 11(a) of the Act against the three accused persons respectively beyond reasonable doubt.
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- [95] On the issue whether the trial judge erred in law to allow the amendment to the charge under s 10(a)(aa) of the Act ie to substitute for the word ‘memperoleh’ the word ‘meminta’, I note that s 158 of the Criminal Procedure Code (‘CPC’) requires that the amended charge be read and explained to the accused. However, in this case, in the notes of evidence (‘the notes’), there is no record that this was done. Section 159 of the CPC
- F provides that the trial can proceed after the amendment if the accused is ready. According to the notes, after the charge was amended, the trial proceeded, and the defence counsel did not object to it. Since the defence counsel did not object at that stage, I think it should not be raised as an issue now. In any case, I believe the purpose of the amendment is to make the charge more specific ie to the state the offence, which is required by s 152 of the CPC.
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- [96] Learned counsel also submitted that the whole evidence of SP1 shows the element of extortion and not the element of corruption since SP1 and SP2 did not commit the offence of *khalwat*. There is no submission by the prosecution on this issue, but here I am again of the opinion that the public prosecutor has the discretion to charge the three accused persons for either the offence of extortion or corruption. For his own reasons, the public prosecutor chose to charge the three accused persons under the Act and he is
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able to discharge his burden of proof on it. Even if the offence of *khalwat* was not committed by SP1 and SP2, the fact remains that the request for gratification by the three accused persons is in relation to their threat of bringing SP1 and SP2 to court for the offence of *khalwat*. SP1 and SP2 were found by the three accused persons in a car together, in the early hours of the morning, on a dark, dead end road on a hill. That was enough to make SP1 and SP2 fearful of the prospect of being charged in court for the offence of *khalwat* if the gratification was not paid. Whether the offence of *khalwat* is committed or not is not material. What is material is that all the ingredients of the charges under ss 10(a)(aa) and 11(a) of the Act were proved.

[97] Accordingly, the respective appeals of the first and second accused are dismissed.

THE PUBLIC PROSECUTOR'S APPEALS AGAINST SENTENCE

[98] For the charge under s 10(a)(aa) of the Act, each of the three accused persons were sentenced to six months imprisonment and a fine of RM25,000 in default six months imprisonment.

[99] For the charge under s 11(a) of the Act, the second and third accused were each sentenced to six months imprisonment and a fine of RM15,000 in default four months imprisonment.

[100] The prosecution is appealing against such sentence on the following grounds:

When passing the sentence, the trial judge placed too much emphasis on the fact that the three accused persons would lose their jobs and would have financial problems even though the act of corruption committed by the three accused persons was committed through an abuse of position and a heavy penalty should be imposed.

[101] In *Public Prosecution v Dato' Waad bin Mansor* [2005] 2 MLJ 101 at p 425 it was held by the Federal Court as follows:

[5] the offence of corruption, if unabated is far more reaching in consequences than crimes of robbery, criminal breach of trust or rape. Therefore, the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

[102] In *Dato' Waad*, the accused, being a member of the State Executive Council was sentenced to two years imprisonment upon appeal against sentence by the public prosecutor.

- A [103] In *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150 (SC), the accused, a former magistrate, was sentenced by the Supreme Court to three years imprisonment for an offence involving the payment of RM15,000 under s 4(a)(i) of the Act.
- B [104] Based on the above two cases cited by the prosecution, I am mindful that the Federal Court or the Supreme Court have passed very deterrent and high custodial sentences for corruption offences under the Act.
- C [105] Applying the same principle in *Dato' Waad*, I am of the opinion that what the three accused persons committed is a serious crime, they being police officers preying on innocent couples such as SP1 and SP2, whilst doing their routine crime prevention rounds. Instead of protecting members of the public, they abused their positions and power, and took the opportunity
- D which arose in the course of their employment and duties, to put fear into SP1 and SP2 regarding a possible prosecution for the offence of *khahwat* in order to solicit RM3,000 for a corrupt purpose ie to enrich themselves unlawfully.
- E [106] I believe that a deterrent sentence should be imposed so that other members of the police force would abhor committing such similar offences of corruption.
- F [107] It is true that the three accused persons would lose their jobs with the Government of Malaysia, but they should have thought twice before committing such offence.
- [108] The appeals of the public prosecutor are allowed.
- G [109] I set aside the sentence of six months imprisonment on each of the charges under s 10(a)(aa) and s 11(a) of the Act, regarding the three accused persons respectively, and substitute it with a sentence of 12 months imprisonment. The sentences are to run concurrently from the date of the court order ie 15 May 2009 or upon final disposal of the appeal from this decision or upon withdrawal of any appeal filed by any of the three accused persons. The original respective sentences on fine are maintained.
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- I [110] Learned counsel for the three accused persons applied for a stay of execution of the above sentence pending the appeals of the three accused

persons. Stay was granted by this court conditional upon the requisite cash bail being posted by the three accused persons with their respective sureties.

Prosecution appeals allowed and accused persons appeals dismissed.

Reported by Ashgar Ali Ali Mohamed

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